Harin Corp Sdn Bhd v Rimbun Tekad Premix (Terengganu) Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T-02(NCVC)(W)-1325–08 OF 2014
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND PRASAD ABRAHAM JJCA
1 APRIL 2016

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Civil Procedure — Appeal — Finding of fact by trial judge — Interference by appellate court — Whether appellate interference warranted

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Contract — Breach — Subcontract — Termination of subcontract by main contractor — Breach of payment of commission agreed upon in letter of award — Whether extrinsic evidence should be employed in interpretation of subcontract — Whether agreed commission of 13.50% to be paid up front as stipulated in letter of award — Whether terms of letter of award could be read into subcontract — Entirety clause — Whether respondent/main contractor precluded from relying on letter of award to give different meaning to subcontract — Counterclaim — Whether termination of subcontract unlawful — Whether there were grounds for termination — Whether termination notice defective

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The respondent was awarded a project to build and commission a main terminal, passenger jetty and provide jetty services in Hulu Terengganu ('the project'). Pursuant to a letter of award dated 31 May 2012, the respondent subcontracted the project to the appellant. On 6 June 2012 the relationship between the appellant, main contractor, and the respondent, subcontractor, was formalised by way of subcontract agreement ('the subcontract'). It was a term of the subcontract that in consideration of the respondent awarding the project to the appellant, the latter would pay a commission sum of RM7,640,060.09 (13.50% of the cost of the project) to the respondent. The subcontract also contained an entirety clause, which stated that the subcontract superseded all other written agreements between the parties. The respondent claimed that the appellant had failed to pay the agreed commission payment of RM4m up front as stated in the letter of award. The respondent claimed that this entitled it to invoke cl 5 of the subcontract and deduct the sums due through the progress payments received. However, the deduction against the progressive claim payment had not been sufficient to cover the RM4m that had been due and payable to the respondent as agreed commission. The respondent then issued a termination notice to terminate the subcontract on the grounds that the appellant had failed to pay the agreed commission as stated in the letter of award and on the grounds that the appellant had failed to complete the

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project within the stipulated time. The appellant claimed that the termination was unlawful. The respondent thus filed a claim against the appellant for the balance of the commission due and payable. In response the appellant argued that there was no stipulation in the subcontract that required it to pay up the RM4m out of the agreed commission of 13.5% upfront as claimed by the respondent. The unlawful termination formed the basis of the appellant's counterclaim against the respondent. The appellant claimed that in fact it was the respondent which was in breach of the subcontract when it interfered with the work of the appellant on site and caused difficulties for the appellant to proceed with the project. As such the appellant counterclaimed for damages caused to its reputation and credibility by the unlawful termination. The trial judge found that the payment of the commission was due to be paid to the respondent upfront as per the letter of award. Hence the High Court allowed the respondent's claim and dismissed the appellant's counterclaim. This was the appellant's appeal against the decision of the High Court.

Held, allowing the appeal with costs and allowing the appellant's counterclaim:

(1) Clause 1(b) of the subcontract, which was the only clause that referred to the payment of commission under the subcontract, provided that the appellant agreed to pay the respondent a commission sum of 13.50% of the cost of the project in the manner stated in the First Schedule of the subcontract. However, this clause did not specify when the commission of 13.50% was to be paid. Further, the First Schedule did not support the case of the respondent that the agreed commission of up to RM4m as stipulated in the letter of award was to be paid up front independent of the progressive claim (see paras 14–16 & 19–20).

(2) A written contract should be interpreted within its four corners and no extrinsic evidence should be employed in its interpretation. Under ss 91 and 92 of the Evidence Act 1950, once a contract had been reduced to writing, neither party could adduce any evidence to contradict or vary the terms of the written contract. The trial judge had misdirected himself and had fallen into error in reading the terms of the letter of award into the subcontract. In addition, the letter of award itself stated that the terms between them would be reduced to writing and that once that happened, as in this case, the letter of award could no longer be part of the terms between the parties unless the terms found in the letter of award were incorporated into the subcontract. This position was further reinforced by the entirety clause in the subcontract. By agreeing to the entirety clause the respondent would be precluded from relying on the letter of award or evidence of any witness to give a different meaning to the subcontract. As such, the trial judge's reliance on the letter of award was misplaced as it did not form part of the terms of the contract between the parties (see paras 21–25).

(3) In the circumstances, the appellant's counterclaim was with basis. The termination was unlawful because it failed to comply with the terms of the subcontract. The first ground cited in the termination notice, namely the failure to pay the agreed commission was outside the scope of the subcontract and could not be a ground of termination. As for the second ground in the termination notice ie the appellant's failure to perform the contract as stipulated, it was unclear under which particular item of cl 15 of the subcontract the respondent had relied on. In any case, under cl 15 of the subcontract the respondent had to give 14 days' written notice to the appellant to remedy the breach. However, the respondent had not given such notice and was thus itself in breach of the subcontract. It therefore followed that the termination was defective and the termination of the subcontract was unlawful (see paras 31–34).

(4) Although the court at the appellate stage was constrained to intervene on the findings of facts by the trial judge, in the present case the trail judge had allowed the respondent's claim without first determining the true construction of the relevant clauses in the subcontract. Therefore, appellate interference was warranted (see para 35).

[Bahasa Malaysia summary

Responden telah diawardkan projek untuk membina dan mengkomisenkan terminal utama, jeti penumpang dan memberikan perkhidmatan jeti di Hulu Terengganu ('projek tersebut'). Menurut surat award bertarikh 31 Mei 2012, responden telah memberi subkontrak projek itu kepada perayu. Pada 6 Jun 2012 hubungan antara perayu, kontraktor utama, dan responden, subkontraktor, telah menjadi formal melalui perjanjian subkontrak ('subkontrak tersebut'). Ia adalah terma subkontrak bahawa sebagai balasan responden memberikan award projek tersebut kepada perayu, perayu akan membayar komisen sejumlah RM7,640,060.09 (13.50% daripada kos projek tersebut) kepada responden. Subkontrak tersebut juga mengandungi fasal keseluruhan, yang menyatakan bahawa subkontrak itu mengatasi semua perjanjian lain antara pihak-pihak. Responden mendakwa bahawa perayu telah gagal untuk membayar bayaran komisen yang telah dipersetujui RM4 juta itu sebagai pendahuluan sepertimana dinyatakan dalam surat award tersebut. Responden mendakwa bahawa ini memberinya hak untuk menggunakan klausa 5 subkontrak tersebut dan menolak jumlah yang perlu dibayar melalui bayaran ansuran yang diterima. Walau bagaimanapun, penolakan terhadap bayaran tuntutan ansuran itu tidak mencukupi untuk menampung RM4 juta yang tertunggak dan perlu dibayar kepada responden sebagai komisen yang dipersetujui. Responden kemudian mengeluarkan notis penamatan untuk menamatkan subkontrak tersebut atas alasan perayu telah gagal membayar komisen yang dipersetujui sepertimana dinyatakan dalam surat award tersebut dan atas alasan bahawa perayu telah gagal menyiapkan projek tersebut dalam tempoh yang ditetapkan. Perayu mendakwa bahawa penamatan itu menyalahi

undang-undang. Responden dengan itu telah memfailkan tuntutan terhadap perayu untuk baki komisen yang tertunggak dan perlu dibayar. Sebagai jawapan perayu berhujah bahawa tiada penetapan dalam subkontrak tersebut yang menghendakinya membayar RM4 juta daripada komisen yang dipersetujui sebanyak 13.5% sebagai pendahuluan sepertimana didakwa oleh responden. Penamatan yang menyalahi undang-undang membentuk asas tuntutan balas perayu terhadap responden. Perayu mendakwa bahawa ia adalah responden yang telah melanggar subkontrak tersebut apabila ia mengganggu kerja perayu di tapak dan menyebabkan kesukaran bagi perayu meneruskan projek tersebut. Oleh itu perayu menuntut balas untuk kerosakan terhadap reputasi dan kebolehpercayaannya melalui penamatan yang menyalahi undang-undang itu. Hakim perbicaraan mendapati bayaran komisen yang tertunggak yang perlu dibayar kepada responden sebagai pendahuluan sepertimana dalam surat award tersebut. Justeru Mahkamah Tinggi telah membenarkan tuntutan responden dan menolak tuntutan balas perayu. Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos dan membenarkan tuntutan balas perayu:

(1) Klausa 1(b) subkontrak tersebut, yang merupakan satu-satunya klausa merujuk kepada bayaran komisen di bawah subkontrak tersebut, memperuntukkan bahawa perayu bersetuju untuk membayar responden komisen sejumlah 13.50% daripada kos projek tersebut dalam cara yang dinyatakan dalam Jadual Pertama subkontrak tersebut. Walau bagaimanapun, klausa ini tidak menetapkan bila komisen 13.50% itu patut dibayar. Selanjutnya, Jadual Pertama tidak menyokong kes responden bahawa komisen yang dipersetujui sehingga RM4 juta sepertimana ditetapkan dalam surat award tersebut perlu dibayar sebagai pendahuluan berasingan dengan tuntutan ansuran (lihat perenggan 14–16 & 19–20).

(2) Satu kontrak bertulis hendaklah ditafsirkan dalam empat penjurunya dan tiada keterangan ekstrinsik patut dimasukkan dalam tafsirannya. Di bawah ss 91 dan 92 Akta Keterangan 1950, setelah suatu kontrak dijadikan secara bertulis, mana-mana pihak tidak boleh mengemukakan apa-apa keterangan untuk menentang atau mengubah terma-terma kontrak bertulis itu. Hakim perbicaraan sendiri telah salah arah dan terkhilaf dalam membaca terma-terma surat award tersebut ke dalam subkontrak tersebut. Tambahan, surat award tersebut itu sendiri menyatakan bahawa terma-terma antaranya akan dijadikan secara bertulis dan setelah itu berlaku, seperti dalam kes ini, surat award tersebut bukan lagi sebahagian daripada terma antara pihak-pihak kecuali terma-terma yang terdapat dalam surat award tersebut telah dimasukkan dalam subkontrak tersebut. Kedudukan ini selanjutnya menguatkuasakan semula keseluruhan klausa dalam subkontrak

tersebut. Dengan bersetuju kepada keseluruhan klausa itu responden akan dikecualikan daripada bergantung kepada surat award tersebut atau keterangan mana-mana saksi untuk memberikan maksud berbeza kepada subkontrak tersebut. Oleh itu, kebergantungan hakim perbicaraan atas surat award tersebut tersalah letak kerana ia tidak membentuk sebahagian daripada terma-terma kontrak antara pihak-pihak (lihat perenggan 21–15).

(3) Dalam keadaan itu, tuntutan balas perayu adalah berasas. Penamatan itu menyalahi undang-undang kerana ia gagal mematuhi terma-terma subkontrak tersebut. Alasan pertama yang dipetik dalam notis penamatan, iaitu kegagalan membayar komisen yang dipersetujui adalah di luar skop subkontrak tersebut dan tidak boleh menjadi alasan untuk penamatan. Alasan kedua pula dalam notis penamatan itu iaitu kegagalan perayu melaksanakan kontrak sepertimana ditetapkan, tidak jelas di bawah butiran tertentu yang mana klausa 15 subkontrak tersebut responden bergantung kepada. Dlaam apa keadaan, di bawah klausa 15 subkontrak tersebut responden perlu memberikan notis bertulis selama 14 hari kepada perayu untuk meremedikan pelanggaran itu. Walau bagaimanapun, responden tidak memberikan notis sedemikian dan oleh itu dengan sendirinya telah melanggar subkontrak tersebut. Oleh demikian ia diikuti bahawa penamatan itu adalah cacat dan penamatan subkontrak tersebut menyalahi undang-undang (lihat perenggan 31–34).

(4) Walaupun mahkamah di peringkat rayuan terhad untuk campur tangan dalam penemuan fakta oleh hakim perbicaraan, dalam kes ini hakim perbicaraan telah membenarkan tuntutan responden tanpa terlebih dahulu menentukan pembentukan sebenar fasal-fasal relevan dalam subkontrak tersebut. Oleh itu, campur tangan pihak rayuan adalah wajar (lihat perenggan 35).]

Notes

For a case on finding of fact by trial judge, see 2(1) *Mallal's Digest* (5th Ed, 2015) para 1330.

For cases on subcontract, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3790–3791.

Cases referred to

Macronet Sdn Bhd v RHB Bank Sdn Bhd [2002] 3 MLJ 11, HC (refd)

Master Strike Sdn Bhd v Sterling Heights Sdn Bhd [2005] 3 MLJ 585, CA (refd)

NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MLJ 38, CA (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92

Appeal from: Civil Suit No 22NCVC-32–05 of 2013 (High Court, Kuala Terengganu)

Samreet Singh Sagoo (Lovelace & Hastings) for the appellant.
Hazri bin Harus (Nurul Izzah bt Mohd Nazri with him) (Zamani Mohammad & Co) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] This appeal by the appellant is against the decision of the learned High Court judge YA Dato' Haji Mohd Yazid bin Haji Mustafa, at Kuala Terengganu in allowing the respondent's claim in the sum of RM1,654,286 together with interest and in dismissing the appellant's counterclaim.

BACKGROUND FACTS

[2] Lembaga Kemajuan Terengganu Tengah ('KETENGAH') had awarded the respondent ('Rimbun Tekad Premix (Terengganu) Sdn Bhd') a contract to build and commission a main terminal, passenger jetty, and provide jetty services, in respect of a project known as Kenyir Trade Centre at Pulau Bayas, Tasik Kenyir, Hulu Terengganu ('the project').

[3] The respondent in turn had, pursuant to a letter of award dated 31 May 2012 offered to subcontract the project to the appellant, Harin Corp Sdn Bhd. The relationship between the appellant and the respondent was formalised by way of a written agreement entered into between them dated 6 June 2012 describing the respondent as the main contractor and the appellant the subcontractor. This agreement is described as the subcontract agreement ('the subcontract'). The main features of the subcontract are these:

(a) the cost of the project is stated under recital B as RM56,593,030.30;

(b) in consideration of the respondent awarding the project to the appellant, the appellant agreed to pay a commission of 13.50% equivalent to RM7,640,060.09 to the respondent ('cl 1(b)');

(c) the commission is to be paid in accordance to the first schedule of subcontract ('cl 1(b)');

(d) payment received by the main contractor from the employer shall be credited into a separate account opened by the main contractor solely for that purpose ('cl 5(a)');

(e) the account will have join signatories of both parties;

(f) the main contractor reserves the right to deduct from each progress payment any sum deductible or entitled under the subcontract;

(g) in a situation where the progress payment is not sufficient to deduct sums due, the main contractor can deduct in the subsequent progress payment;

(h) events for determination of the subcontract are listed in cl 15; and

(i) the subcontract contains an entirety clause wherein it is stated that the subcontract supersedes all written memorandum, agreements, representations or understanding between parties ('cl 22(e)').

[4] The respondent's claim was for the payment of commission in total of RM4m which according to the respondent, had become due and payable as follows:

(a) first payment due in the first month (June 2012), RM1.5m;

(b) second payment due in July 2012, RM500,000; and

(c) third payment due in August 2012, RM2m ('third payment').

[5] The case of the respondent was that a total of RM4m had became due and payable by August 2012. The appellant's case was that there was nothing in the subcontract that stipulates that the appellant had to pay up the RM4m out of the total commission as claimed. The stipulations were only found in the letter of award which in our view did not form part of the subcontract.

[6] The respondent said the appellant had failed to pay the agreed commission due as above. This entitled the respondent to invoke cl 5 to deduct the sums due through the progress payment. The respondent had tabulated below as to how the deduction of the progress payment had been made by the respondent from the progressive claim. Accordingly the deduction against the progressive claim payment was not sufficient to cover the RM4m due:

Bil	Sijil Perakuan Bayaran Interim	Jumlah diperakui	Jumlah dipotong (susulan Deed of Assignment Lifomax Woodbuild Sdn. Bhd.)	Jumlah dipotong (wang tahanan)	Jumlah diperolehi
7.1	No. 1 (11.9.2012)	RM1,236,036.67	-	RM123,600.00	RM1,112,400.00
7.2	No. 2 (9.11.2012)	RM1,825,781.68	RM774,540.00	RM182,570.00	RM 868,590.00
7.3.	No. 3 (5.12.2012)	RM 647,422.99	RM117,936.00	RM 64,700.00	RM 464,724.00
JUMLAH KESELURUHAN DIPEROLEHI					**RM2,445,714.00**

[7] Having deducted the sums from the progressive payment as above and after deducting a further sum of RM100,000 which was paid earlier by the respondent there is still a balance of RM1,654,286 to be paid. This is the sum claimed by the respondent under the subcontract in this suit.

[8] It is the respondent's case also that this non-payment of the commission due by the appellant had caused a breach of the subcontract by the appellant. The respondent further alleged that the appellant had also breached the term of subcontract for failure to complete the project within time stipulated. This failure had caused the delay in the progress of the project. Premised on these two grounds, and after given due warning, the appellant failed to complete the project in the workmanlike manner, the respondent proceeded to terminate the subcontract.

[9] Accordingly, *vide* a notice dated 27 November 2012 the respondent issued a termination notice purportedly under cl 15(a) to terminate the subcontract. The termination notice is found at p 260 of the record of appeal ('Part C'). The termination notice had stipulated two grounds as the reasons for termination. The first ground of termination cited by the respondent in the termination notice was the failure to pay the agreed commission as stated in the letter of award dated 31 May 2012 and the second ground was the delay in the progress of the project.

[10] The respondent contested the termination notice as being an unlawful termination. This formed the basis of the appellant's counterclaim against the respondent.

[11] The learned High Court judge had allowed the claim of the respondent and dismissed the counterclaim of the appellant. In his grounds of judgment the learned judge agreed that the payment of commission was due to be paid to the respondent upfront right from the first month as stipulated in the letter of

award. The learned trial judge allowed the claim of the respondent and had dismissed the counterclaim of the appellant. Against this decision, the appellant had lodged its appeal.

[12] In our view this appeal can be disposed by determining two main issues viz; whether the learned judge was correct in his finding and allowing the claim of the respondent that RM4m out of the agreed commission of 13.50% was to be paid upfront as stipulated in the letter of award and whether or not the termination of the subcontract was lawfully made by the respondent.

[13] In his grounds of judgment at para 19 the learned trial judge had found that 'Berdasarkan terma-terma perjanjian sub-kontrak, defendan telah bersetuju untuk menjelaskan RM4 juta pada bulan Jun, Julai dan Ogos 2012 di mana defendan hendaklah membayar kepada plaintif jumlah RM4 juta secara terus tanpa mengikut jumlah tuntutan progress claim'. Though the learned judge had stated that the claim of the respondent was allowed based on the terms of the subcontract it is apparent that the learned High Court judge had relied on the terms in the letter of award. We say so because there is no clause in the subcontract which spells out the same terms of payment as stipulated under the letter of award.

[14] The only clause that refers to the payment of commission under the subcontract is cl 1(b) which we produce in extensor below:

> Clause 1(b)
>
> In consideration of The Main Contractor hereby appoints the subcontractor to construct and complete the Works and make good any defects whatsoever to the Works in conformity in all respects to the provisions of the Main Contract and in accordance with the terms and conditions set out in this Agreement, the subcontractor hereby agree to pay to the Main Contractor at a percentage of 13.50% from the subcontract Sum AND shall be paid by the subcontractor to the Main Contractor by the manner and at the amount stated in the First Schedule herein.

[15] This clause does not specify when the commission of 13.50% is to be paid. The manner of payment is stated as per the first schedule. Learned counsel for the respondent contended that cl 1(b) above read together with the first schedule would show that the amount of RM4m out of the total 13.50% would become payable as per stipulated in the letter of award.

[16] We have perused through the clauses in the subcontract and we do not find any clause to suggest the payment of the agreed commission of up to RM4m in total as stipulated in the letter of award would have to be paid

upfront. We further do not find the first schedule support the case of the respondent, that part of the commission is to be paid upfront independent of the progressive claim.

[17] We have also examined the first schedule attached to the subcontract. We reproduce the said schedule for better appreciation of it.

Schedule 1

JADUAL PEMBAYARAN – KJPB

Bil. Kontrak	56,593,030.30		BuilderWorks $ 42,193,030.30
13.50%	7,640,059.09	*Berdasarkan Final Contract Sum	

Bulan		RIMBUN TEKAD	SUB CON	
		Nilai Bayaran Komisen	Estimate Progress Claim	Cumulative Progress Claim
1	Bayaran Fee permulaan	1,500,000.00		
2	Bayaran Fee Berperingkat	500,000.00	2,500,000.00	2,500,000.00
3	Bayaran Fee Berperingkat	2,000,000.00	3,565,445.00	6,065,445.00
4	Bayaran Fee Berperingkat	256,858.32	3,565,445.00	9,630,890.00
5	Bayaran Fee Berperingkat	256,858.32	3,565,445.00	13,196,335.00
6	Bayaran Fee Berperingkat	256,858.32	3,565,445.00	16,761,780.00
7	Bayaran Fee Berperingkat	180,102.57	2,500,000.00	719,261,780.00
8	Bayaran Fee Berperingkat	256,858.32	3,565,445.00	22,827,225.00
9	Bayaran Fee Berperingkat	258,858.32	3,565,445.00	26392,670.00
10	Bayaran Fee Berperingkat	258,858.32	3,565,445.00	29,958,115.00
11	Bayaran Fee Berperingkat	251,182.38	3,486,657.50	33,444,772.50
12	Bayaran Fee Berperingkat	256,858.32	3,565,445.00	37,010,217.50
13	Bayaran Fee Berperingkat	96,775.09	1,343,333.00	38,353,550.50
14	Bayaran Fee Berperingkat	96,775.09	1,343,333.00	39,696,883.50
15	Bayaran Fee Berperingkat	489,878.98	6,800,000.00	46,496,883.50
16	Bayaran Fee Berperingkat	489,878.98	6,800,000.00	53,296,883.50
17	Bayaran Fee Berperingkat	96,775.09	1,343,333.00	54,640,216.50
18	Bayaran Fee Berperingkat	140,682.71	1,952.813.80	56,593,030.30

PEMBAYARAN KOMISEN	3,640,059.09
KONTRAK = (56,593,030.30 – 6,065,445.00)	50,527,585.30
JUMLAH KOMISEN MENGIKUT INTERIM 4 DAN SETERUSNYA	7.204%

[18] Having further examined the first schedule closely, it would appear that the payment of commission is listed in column 1 which is described as *Bayaran Fee Berperingkat*. The first part of that column lists the month next to *Bayaran Fee Berperingkat*, the next column is the estimate progress claim, followed by cumulative progressive claim in the last column.

[19] From our observation *Bayaran Fee Berperingkat* seems to be pegged to

the progress claim in the third column. This is in tandem with cl 5 which provides for the respondent to deduct the same from the progressive claim. In our view the first schedule had not stipulated the upfront mode of payment of the commission suggested by the respondent in the way it was stipulated in the letter of award.

[20] Learned counsel for the respondent, beside urging us to construe the subcontract to be read with the first schedule had also sought to further rely on the letter of award as well as the testimonies of the witness for the plaintiff SP3 to persuade us to agree to his construction of the subcontract. SP3 was the solicitor who prepared the subcontract. The evidence of SP3 is referred to is found in his witness statement, in answering question Nos 8 and 9. SP3 in his answer only said that the payment of the commission is to be based on the first schedule. He further said the first three payment of the agreed commission would have to be paid independent of the progress claim from the first to the third month of the subcontract. We are not able to find such a clause in support of his statement.

[21] We however agree with the learned counsel for the appellant that the subcontract must be construed within its four corners. Once a contract has been reduced to writing neither party can rely on ss 91 and 92 of the Evidence Act 1950 to adduce any evidence to contradict or vary the terms thereof. In our view the learned judge had misdirected and had fallen into error in reading the terms in the letter of award into the subcontract. For one thing, the letter of award itself states that the terms between them would be reduced to writing. Once that is done the letter of award can no longer part of the terms between parties unless the terms are incorporated into the subcontract. Whatever terms found in the letter of award which are not clearly stipulated in the subcontract should no longer form part of the terms of the subcontract. This position is further reinforced by the entirety clause, which parties had agreed for the subcontract to supersede all written memorandum, agreements, representations or understanding between parties (see cl 22(e)).

[22] There is no dearth of authority to support the legal proposition that a written agreement must be interpreted within its four corners. It is trite law that interpretation of a contract is a question of law to be decided by the court and not by witnesses through their oral evidence (see *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38). In *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585 the Court of Appeal held, in applying the dictum of Abdul Aziz Mohammad J in *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11 on the effect of an entire agreement clause, held that the entire agreement clause is an agreement between parties and in adhering to such a clause they must have been presumed to know the existence of s 92 of the Evidence Act 1950 and its exception. And by doing so the parties

A are in fact agreeing not to resort to the exception.

[23] Adhering to that principle of legal interpretation in our view the commission of 13.50% had been agreed by parties as stated in cl 1(b) and the commission shall be paid in accordance with the first schedule attached to the B subcontract. The first schedule however do not state that the RM4m out of the total commission is to be paid upfront as what has stated in the letter of award. Falling back to the terms of the subcontract the right of the respondent had been provided under cl 5 which allowed deduction been made from the C progressive claim due under the subcontract.

[24] Furthermore, the subcontract contains an entirety clause. In agreeing to the entirety clause, the parties must be presumed to have known of the existence of s 92 and its exceptions and to have intended what the clause D intended, that is to exclude any attempt to vary the agreement by an oral agreement or statement. Such attempt can only be made through the exceptions to s 92 of the Evidence Act 1950. By agreeing, to the entire agreement clause also, the respondent in this case is therefore precluded from relying on the letter of award or evidence of any witness to give a different E meaning to the subcontract which contains the entire agreement clause.

[25] The line of submission adopted by the counsel for the respondent is not in accord with the long established legal principle that a written contract must be interpreted within its four corners and no extrinsic evidence should be F employed in its interpretation. Thus it is not for SP3 to explain what was intended by the clauses of the agreement he drafted. His responsibility in our view is to translate his client's instruction into agreement and it is the duty of the court to interpret the written agreement in accordance with established legal principles. Thus the reliance on the letter of award by the learned judge in G our view is misplaced as it does not part of the terms of contract between parties.

[26] Learned counsel for the appellant also raised the issue of mala fide on the part of the respondent for failure to adhere to cl 5 of the subcontract. Under H cl 5, the respondent is obliged to open an account especially to credit progress payment made by the KESEDAR for the project. The signatories to the account should be equally represented. The account was indeed opened at RHB bank Cawangan Kuala Terengganu. The parties had agreed and named Mohd Ahmad Ruzman Mohammad Shafei to represent the appellant and I Mohd Khairuddin as the representative of the respondent.

[27] The deduction made by the respondent in our view was therefore not in accordance with the subcontract for this other reason. When the first interim payment of RM1,236,036.67 was paid by the employer the respondent had

directed the payment to be paid into another account instead without the knowledge of the appellant. The respondent then paid the appellant RM100,000 out of the first interim payment after the appellant pleaded for it because it needed the fund for the project. As for the second interim payment of RM1,643,130, the third interim payment of RM 582,660 and the fourth interim payment of RM337,680, they were all directed by the respondent to be paid into another account of the respondent in breach of the agreed term under cl 5. It is the appellant's case that such breach constitutes mala fide conduct on the part of the respondent. The respondent had not been truthful in concealing the payment received for KESEDAR, depriving the monies due under the progress claim to the appellant which had caused the project to fail.

[28] This then bring us to the counterclaim of the appellant.

THE COUNTERCLAIM

[29] The counterclaim of the appellant was premised on the allegation that the termination of the subcontract was unlawful. The appellant contended that in fact it was the respondent which was in breach of cl 5 of the subcontract, when it interfered with the work of the appellant on site and had caused difficulties for the appellant to proceed with the project. On these reasons the appellant contended that the termination was unlawful, without any basis and had caused damages and loss of reputation and credibility of the appellant. As a result, the appellant sought for damages as stipulated in para 23 of the defence and counterclaim.

[30] The learned trial judge dismissed the counterclaim by the appellant as His Lordship found that the appellant failed to prove fraud. In his judgment he said 'Defendan gagal membuktikan bahawa plaintif telah melakukan penipuan dan lain-lain alegasi yang dinyatakan di dalam penyata pembelaan dan tuntutan balas defendan. Plaintif telah menyatakan plaintif telah melakukan salah nyata dan fraud apabila memasukkan bayaran kemajuan pertama, kedua, dan ketiga ke dalam akaun plaintif. Kedudukan undang-undang adalah mantap apabila defendan memplidkan wujudnya fraud di pihak plaintif, defendan hendaklah membuktikan elemen fraud tersebut di luar keraguan munasabah yang mana defendan telah gagal berbuat demikian'.

[31] In our view the counterclaim is with basis. We agree with the appellant that the termination was unlawful because it failed to comply with the terms of the subcontract. We have further examined the clauses on termination under the subcontract. We took note that the termination notice had cited two reasons for the termination of the subcontract which are these. First the failure to pay the agreed commission under cll 2(1), (ii) and (iii) of *surat pelantikan*

and secondly the failure of the appellant to complete the project as per the catch up plan.

[32] We had in the preceding paragraphs stated our view that the subcontract must be read within its four corners and the reliance on the terms of letter of award is excluded by the entirety clause as found in the subcontract. Hence the first ground cited in the termination notice was outside the scope of the subcontract and cannot be a ground of termination.

[33] Furthermore, the subcontract under its cl 15 specifies the grounds of termination and is listed in cl 15(a). The failure to perform the contract as stipulated is, inter alia, one of the grounds of termination stated under cl 15. We are not clear too under which particular item of cl 15, the respondent relied on when it states in the notice that the appellant failed to complete the project as per the catch up plan. We are unable to find the term catch up plan used in the subcontract.

[34] That notwithstanding, under the same clause the respondent had to give 14 days' written notice provided that the respondent itself is not in breach of the subcontract. Crucially the 14 days' notice normally is necessary in case the breach can be remedied. The notice at p 260 dated 27 November 2012 issued is to take immediate effect. The notice had overemphasised the effective date to be immediate, when it further instructed the appellant to cease all works on site and to remove all the employees and to hand over the project site to the respondent. Thus it is clear to us that, the notice was wrong both in form and in substance. It follows that the termination is defective and the termination of the subcontract is unlawful.

[35] We are mindful that this court at the appellate stage is constrained to intervene on the findings of facts by the trial judge. We find this is a case where the learned trial judge ignored the pleadings of the respondent when it claimed the sum over due under cl 1 read together with the First Schedule, but its termination cited a breach under the letter of undertaking and the learned trial judge had allowed the claim without first determining what was his true construction of the relevant clauses in the subcontract. Ultimately, it would appear that the learned judge was persuaded by the submission and the notice of termination which anchored upon the breach of payment of the commission agreed upon in the letter of award, which had been excluded by the entirety clause under the subcontract.

[36] In conclusion we allow the appeal of the appellant against the High Court's decision with costs. We set aside the order of the High Court and we dismissed the claim of the respondent and allowed the counterclaim of the appellant.

[37] In the result, we allowed the sum of RM2,015,542.61 be paid to the appellant after deducting 13.5% and RM100,000 to the respondent. **A**

Appeal allowed with costs and appellant's counterclaim allowed.

Reported by Kohila Nesan **B**

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